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## MALLENG ENTERPRISES SDN BHD v. LENG FOOK SING

COURT OF APPEAL, PUTRAJAYA
PRASAD SANDOSHAM ABRAHAM JCA
ZABARIAH MOHD YUSOF JCA
ASMABI MOHAMAD JCA

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[CIVIL APPEAL NO: W-02(NCVC)(W)-2092-12-2015]
12 DECEMBER 2017

***LAND LAW:*** *Ownership – Claim for – Co-proprietors of land entered into sale and purchase agreement with purchaser – Payment made in full – Land consistently*

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*entered into purchaser's accounts books as asset – Purchaser paid quit rent, assessment and fire policy – Discovery that land not transferred into purchaser's name – Whether purchaser was beneficial owner of land – Whether vendor was holding land on trust for purchaser – Whether purchaser entitled to recover vendor's undivided share in land which was trust property – Whether there was delay in*

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*prosecuting claim for ownership*

***EVIDENCE:*** *Adverse inference – Non-production of evidence and non-calling of witnesses – Claim for ownership of land by purchaser against vendor – Vendor did not call any witnesses after close of purchaser's case – No case to answer – Whether allegations and evidence adduced by purchaser must be taken to be true*

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The respondent ('the defendant') and one Leng Fook Cheung ('LFC') were the directors of the appellant ('the plaintiff'). The defendant, as co-proprietors of a piece of land, entered into a sale and purchase agreement ('the SPA') with the plaintiff for the sale of the said land. Since September 1987, the land was consistently entered into the plaintiff's account books as

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its assets and the plaintiff paid the quit rent, assessment and fire policy for the land. The plaintiff later discovered that the land was not transferred into its name although the purchase price was paid in full. When the plaintiff requested the defendant to execute a valid memorandum of transfer for the land in the plaintiff's favour, the defendant refused. This prompted the

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plaintiff to commence a claim at the High Court against the defendant on the grounds that (i) the plaintiff was the beneficial owner of the land; (ii) the defendant was holding the land on trust for the plaintiff; and (iii) the plaintiff was entitled to recover the defendant's undivided share in the land which was the trust property. The plaintiff further claimed rental proceeds in the

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defendant's possession or previously received by the defendant and converted to his own use. In support of its claim, the plaintiff relied on three categories of documents, namely, the plaintiff's (i) documents and/or records; (ii) audited accounts; and (iii) account books. The defendant did not call any witness after the plaintiff closed its case. The trial judge dismissed

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the plaintiff's claim without considering these documents as the plaintiff failed to call the makers of the same. The trial judge held that (i) the

defendant's failure to call any witness did not mean that adverse inference should be invoked against him; (ii) the defendant was not the controlling mind of the plaintiff but it was one Leng Kean Kok ('LKK') who acted as the plaintiff's *de facto* director; and (iii) estoppel operated against the plaintiff as there were laches and inordinate delay on the part of the plaintiff in prosecuting its claim against the defendant. Hence, the present appeal.

**Held (allowing appeal)**
**Per Zabariah Mohd Yusof JCA delivering the judgment of the court:**

**(1)** The entries in the audited accounts corresponded with various other documents, which were records of the plaintiff, which showed that the statement in the documents were made contemporaneous with other documents/records of the plaintiff and with the fact that the land was sold to the plaintiff. After the SPA was entered, the land was consistently recognised as the plaintiff's asset in its financial documents without any objection from parties. The purchase price was treated as 'amount owing to the director' in the plaintiff's financial documents. Rental income from the land was also consistently remitted on a monthly basis to the plaintiff. The defendant and LFC, by act and conduct, consistently acknowledged and admitted that the land belonged to the plaintiff. (paras 48 & 49)

**(2)** The trial judge erred in fact and in law in holding that the defendant was not the controlling mind of the plaintiff. Such fact was not pleaded by the defendant. There was no evidence to show that LKK was the *de facto* managing director or even a director of the plaintiff. Furthermore, the defendant was the only director controlling the plaintiff at the material time until his resignation as LFC was incapacitated due to a stroke. Hence, the defendant was responsible for the financial arrangement/ management in respect of the transaction of the SPA, *ie* to be credited into his director's account. (para 57)

**(3)** The trial judge erred in (i) not asking the question of whether the defendant had a case to answer, if the plaintiff's evidence, if believed to be true, was sufficient to prove its case; and (ii) failing to draw an adverse inference against the defendant for failing to give evidence on the entries in the plaintiff's accounts books which showed advances being made to him by the plaintiff that constituted consideration for the land. The fact whether payments were made for the lands and whether the advances to the defendant constituted purchase considerations paid by the plaintiff to the defendant, were relevant matters within the knowledge of the defendant. This misdirection on the part of the trial judge occasioned a miscarriage of justice which resulted in the non-judicial appreciation of the evidence of the plaintiff. The allegation and the evidence adduced by the plaintiff on the matter in dispute must be taken to be true. (paras 63, 64, 66 & 67)

**(4)** The trial judge failed to appreciate the evidence adduced which explained why the suit was only brought in 2014. It was only after the defendant had resigned from the directorship of the plaintiff, and after the additional directors were appointed to the Board of Directors in 2013, that it was discovered that the land had not been transferred to the plaintiff. It was only at that point in time that the plaintiff could issue the demand or institute proceedings against the defendant. Therefore, there was no delay on the part of the plaintiff. (paras 70 & 73)

**(5)** As the plaintiff was the beneficial owner of the land, the plaintiff was entitled to collect the rental out of the land. Since the full purchase consideration of the land had been paid, the defendant held the land as constructive trustee for and on behalf of the plaintiff. Whatever rental proceeds that the defendant collected over the years were to be held on trust for the plaintiff, out of which should be remitted back to the plaintiff. (para 76)

***Bahasa Malaysia*** *Headnotes*

Responden ('defendan') dan seorang bernama Leng Fook Cheung ('LFC') adalah pengarah perayu ('plaintif'). Defendan, sebagai pemilik bersama sebidang tanah, memeterai satu perjanjian jual beli ('PJB') dengan plaintif bagi jualan tanah tersebut. Sejak September 1987, tanah tersebut, secara konsisten, direkodkan sebagai aset dalam buku akaun plaintif dan plaintif membayar cukai pintu, penilaian dan polisi kebakaran tanah tersebut. Plaintif kemudian mendapati tanah tersebut tidak dipindah milik bawah namanya walaupun harga belian sudah dibayar penuh. Apabila plaintif memohon agar defendan melaksanakan memorandum memindah milik tanah tersebut kepada plaintif secara sah, defendan enggan. Ini mendorong plaintif memulakan tuntutan di Mahkamah Tinggi terhadap defendan atas alasan (i) plaintif adalah pemilik benefisial tanah tersebut; (ii) defendan memegang tanah tersebut sebagai amanah bagi pihak plaintif; dan (iii) plaintif berhak mendapatkan semula bahagian tanah defendan yang tidak dibahagikan iaitu harta amanah. Plaintif selanjutnya menuntut hasil sewaan dalam milikan defendan atau yang sebelum ini diterima oleh defendan dan ditukar menjadi untuk kegunaannya sendiri. Menyokong tuntutannya, plaintif bersandar pada tiga kategori dokumen, iaitu, (i) dokumen dan/atau rekod plaintif; (ii) akaun yang diaudit; dan (iii) buku akaun. Defendan tidak memanggil mana-mana saksi selepas plaintif menutup kesnya. Hakim bicara menolak tuntutan plaintif tanpa mempertimbangkan dokumen-dokumen ini kerana plaintif gagal memanggil pembuat-pembuatnya. Hakim bicara berpendapat (i) kegagalan defendan memanggil mana-mana saksi tidak bermaksud anggapan bertentangan wajar diguna pakai terhadapnya; (ii) defendan bukanlah minda yang mengawal plaintif tetapi seorang bernama Leng Kean Kok ('LKK') yang sebenarnya bertindak sebagai pengarah *de facto*; dan

(iii) estoppel beroperasi terhadap plaintif kerana terdapat kelengahan dan kelewatan melampau oleh plaintif dalam memulakan tuntutan terhadap defendan. Maka timbul rayuan ini.

**Diputuskan (membenarkan rayuan)**
**Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:**

**(1)** Pemasukan dalam akaun yang diaudit selaras dengan pelbagai dokumen lain, iaitu rekod-rekod plaintif, yang menunjukkan penyataan dalam dokumen dibuat selaras dengan dokumen-dokumen/rekod-rekod lain plaintif dan fakta bahawa tanah tersebut dijual kepada plaintif. Selepas PJB dimeterai, tanah tersebut, secara konsisten, diakui sebagai aset plaintif dalam dokumen kewangannya tanpa apa-apa bantahan oleh pihak-pihak. Harga belian dianggap 'amaun terhutang pada pengarah' dalam dokumen kewangan plaintif. Pendapatan sewa tanah juga, secara konsisten, dikembalikan kepada plaintif setiap bulan. Defendan dan LFC, melalui tindakan dan kelakuan, secara konsisten mengiktiraf dan mengakui tanah tersebut milik plaintif.

**(2)** Hakim bicara terkhilaf dari segi fakta dan undang-undang apabila memutuskan defendan bukanlah minda yang mengawal plaintif. Fakta ini tidak diplidkan oleh defendan. Tidak ada keterangan yang menunjukkan LKK adalah pengarah urusan *de facto* bahkan pengarah plaintif. Selain itu, defendan satu-satunya pengarah yang mengawal plaintif pada masa material hingga peletakan jawatannya kerana LFC tidak berupaya akibat diserang strok. Oleh itu, defendan bertanggungjawab terhadap perancangan/pengurusan kewangan berkenaan transaksi PJB, iaitu dikreditkan dalam akaun pengarahnya.

**(3)** Hakim bicara terkhilaf kerana (i) tidak mengajukan soalan sama ada defendan mempunyai kes untuk dijawab, jika keterangan plaintif, jika dipercayai benar, cukup untuk membuktikan kesnya; dan (ii) gagal membangkitkan anggapan bertentangan terhadap defendan kerana tidak memberi keterangan tentang pemasukan dalam buku akaun plaintif yang menunjukkan pendahuluan yang dibuat kepadanya oleh plaintif yang menjadi balasan bagi tanah tersebut. Fakta sama ada bayaran dibuat untuk tanah dan sama ada pendahuluan yang dibayar kepada defendan adalah balasan yang dibayar oleh plaintif kepada defendan, adalah hal perkara relevan dalam pengetahuan defendan. Salah arah hakim bicara mengakibatkan kesilapan mahkamah dan seterusnya menyebabkan kegagalan mempertimbangkan keterangan plaintif. Dakwaan dan keterangan yang dikemukakan oleh plaintif tentang hal perkara yang dipertikaikan mestilah dianggap benar.

**(4)** Hakim bicara gagal mempertimbangkan keterangan yang dikemukakan yang menjelaskan mengapa guaman hanya dimulakan pada 2014. Hanya setelah defendan meletak jawatan sebagai pengarah plaintif, dan setelah pengarah-pengarah tambahan dilantik ke Lembaga Pengarah pada 2013, barulah disedari bahawa tanah tersebut tidak dipindah milik kepada plaintif. Hanya ketika itulah plaintif boleh memulakan tuntutan atau prosiding terhadap defendan. Oleh itu, tiada kelewatan oleh plaintif.

**(5)** Oleh kerana plaintif ialah pemilik benefisial tanah tersebut, plaintif berhak mengutip sewanya. Memandangkan balasan belian tanah sudah dibayar penuh, defendan memegang tanah tersebut sebagai pemegang amanah konstruktif untuk dan bagi pihak plaintif. Apa-apa hasil sewa yang defendan kutip bertahun-tahun selama ini dipegang sebagai amanah bagi plaintif dan kesemuanya perlu dikembalikan kepada plaintif.

**Case(s) referred to:**

*Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua [2006] 3 CLJ 27 CA* ***(refd)***

*Archibald v. Scully [1861] IX HLC 360* ***(refd)***

*Cheah Kim Tong & Anor v. Taro Kaur [1989] 2 CLJ 791; [1989] 1 CLJ (Rep) 378 HC* ***(refd)***

*Crawford v. Financial Institutions Services Ltd (Jamaica) [2005] UKPC 40* ***(refd)***

*Foo Holdings Sdn Bhd & Anor v. Foo Choon Ying [2013] 1 LNS 908 HC* ***(refd)***

*Garforth (Inspector of Texas) v. Newsmith Stainless Ltd [1979] 2 All ER 73* ***(refd)***

*IJM Corporation Bhd v. Zamri Hj Ibrahim & Anor [2014] 7 CLJ 479 CA* ***(refd)***

*Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC* ***(refd)***

*Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties) [2001] 6 CLJ 104 HC* ***(refd)***

*Subry Hamid v. Husaini Tan Sri Ikhwan & Anor [2006] 4 CLJ 50 CA* ***(refd)***

*Takako Sakao v. Ng Pek Yuen & Anor [2001] 1 CLJ 381 FC* ***(refd)***

**Legislation referred to:**

Evidence Act 1950, ss. 32(1)(b), 34, 73A(1)(a)(ii), (2)

Limitation Act 1953, ss. 6, 9

**Other source(s) referred to:**

Sarkar*, Evidence,* 16th edn, p 1678

*For the appellant - Cindy Goh Joo Seong, Heidi Lim Ai Yuen, Lam Kian Yip; M/s Cheang & Ariff*

*For the respondent - John Skelchy & Perry Tan; M/s Perry & Co*

*[Editor's note: For the High Court judgment, please see Malleng Enterprise (M) Sdn Bhd v. Leng Fook Sing [2015] 1 LNS 1198 (overruled).]*

*Reported by Najib Tamby*

## JUDGMENT

**Zabariah Mohd Yusof JCA:**

**[1]** The appellant's (plaintiff in the High Court) claim in the High Court against the respondent (defendant in the High Court) was to recover a piece of land held under H.S.(D) 27505, Lot No 19160, Kuala Lumpur, Wilayah Persekutuan with a double storey shop house erected thereon (hereinafter referred to as "the land").

**[2]** The plaintiff claimed that it is the beneficial owner of the land, and the defendant is holding the land on trust for the plaintiff and the plaintiff is entitled to recover the defendant's undivided share in the land which is the trust property. The plaintiff is also claiming rental proceeds in the defendant's possession, or previously received by the defendant and converted to his own use.

**[3]** After a full trial, the learned trial judge of the High Court dismissed the said claim.

**[4]** The plaintiff appealed to the Court of Appeal. The matter came before us and after hearing submissions of the parties and perusing through the appeal records, we hereby unanimously, allowed the appeal and set aside the decision of the High Court Judge. Our reasons for doing so follow.

**[5]** Parties shall be referred to as they were in the High Court in this judgment.

### Background

*Undisputed Facts*

**[6]** The plaintiff is an investment holding company. At the material time, the defendant and one Leng Fook Cheung (LFC) were the only directors of the plaintiff. They were the founding members as well as the directors since the incorporation of the plaintiff on 25 August 1981.

**[7]** The defendant and LFC were co-registered proprietors of the land.

**[8]** On 19 August 1987, the defendant and LFC, as co proprietors of the land entered into a sale and purchase agreement (SPA) to sell the land to the plaintiff at a total consideration of RM350,000 (hereinafter referred to as "the SPA").

*The Plaintiff's Case*

**[9]** On 19 August 1987, the Board of Directors of the plaintiff, which comprised of the defendant and LFC signed a Board Resolution resolving that the plaintiff enters into the SPA.

**[10]** Since September 1987, the land has been consistently entered into the plaintiff's accounts books as its assets. The plaintiff has been paying the quit rent, assessment and fire policy for the land from the date of the SPA and also obtained a clearance from the DG of the Inland Revenue that no chargeable gain had arisen from the disposal of the land by the defendant and LFC in 1987.

**[11]** LFC suffered a stroke in December 1999 and thereafter ceased to effectively manage the affairs of the plaintiff. Hence, the defendant was the only director managing the affairs of the plaintiff from December 1999 until March 2013.

**[12]** Due to LFC being incapacitated to manage the affairs of the plaintiff, the management of the plaintiff was left entirely to the defendant. It was alleged by the plaintiff, after 1999, the plaintiff was managed according to the whims of the defendant. No accounts were filed by the plaintiff and no AGM was held in accordance with the law. Due to this state of affairs of the plaintiff, the majority shareholders had to appoint additional directors to the plaintiff in 2013. Thereafter, the defendant resigned as a director of the plaintiff.

**[13]** After the additional directors were appointed, the plaintiff discovered that the land had not been transferred into the name of the plaintiff although the purchase price had been paid in full.

**[14]** The plaintiff alleged that although the ownership of the land is currently still registered under the name of the defendant and LFC as equal co-proprietor, the plaintiff alleged that the defendant held his undivided share of the land as constructive trustee for the plaintiff on the basis that the plaintiff has paid the full purchase price of the land to the defendant.

**[15]** On 30 December 2013, the plaintiff wrote to the defendant requesting the defendant to execute a valid memorandum of transfer in favour of the plaintiff in respect of the land.

**[16]** The defendant responded *vide* a letter dated 7 January 2013 denying the beneficial claim of the plaintiff over the land and refused to execute the memorandum of transfer.

**[17]** Hence the filing of the suit against the defendant, wherein the plaintiff prayed for:

(i) a declaration to declare the plaintiff as the beneficial owner of the defendant's undivided share of the land;

(ii) a declaration that the defendant was holding his undivided share of the land as constructive trustee for the plaintiff;

(iii) a declaration that the rental proceeds received by the defendant from the land are held on trust for the plaintiff and that an assessment proceeding to be held to assess the rental proceeds received over the years since year 2000;

(iv) an order to compel the defendant to execute a memorandum of transfer in favour of the plaintiff as well as an order to compel the land registry to effect the transfer of proprietorship into the name of the name of the plaintiff;

(v) damages and costs.

**The Defendant's Case**

**[18]** On 19 August 1987, the plaintiff, the defendant and LFC entered into the SPA for the sale of the land for a consideration of RM350,000 whereby RM1 has been paid to the defendant and LFC as partial purchase price of the land.

**[19]** The defendant pleaded that the balance purchase price has not been paid. Neither is there proof of any payment of RM1 deposit being made to the defendant and LFC, recorded in any documents, or in the plaintiff's accounting records.

**[20]** Hence, there has been a failure of consideration. The plaintiff has breached the terms of the SPA which was entered between the plaintiff and defendant and LFC.

**[21]** The plaintiff failed to pay the purchase price for the past 27 years and the defendant pleaded limitation under ss. 6 and 9 of the Limitation Act 1953.

*The Trial In The High Court*

**[22]** At the trial in the High Court, the plaintiff called two witnesses, ie:

(i) Leng Kean Meng (PW1), the current director of the plaintiff;

(ii) Doo Ghin Szee (PW2), an auditor from the audit firm of the plaintiff;

The defendant, however did not call any witness and closed its case without adducing any evidence.

**[23]** The agreed issues to be tried are:

(i) whether the balance purchase price of the land for the half undivided share belonging to the defendant has been paid by the plaintiff; and

(ii) whether the defendant held the half undivided share of the land as constructive trustee for the plaintiff.

A **[24]** The main thrust of the plaintiff's claim is premised on the allegation that the defendant's share of the balance purchase price under the SPA has been paid by the plaintiff to the defendant. To support its claim, the plaintiff relied on three categories of documents, namely:

(i) documents and/or records of the plaintiff;

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(ii) audited accounts of the plaintiff;

(iii) account books of the appellant such as ledger, journal entries, cash books, etc.

C **[25]** It is not in dispute that cl. 1 of the SPA stated that a deposit of RM1 has been paid by the plaintiff, as purchaser, to the defendant and LFC, as vendors. Hence, the defendant's submission that there is no proof of the payment of RM1 deposit being recorded in any document or in the plaintiff's accounting record, cannot be accepted. This was also the finding of the trial judge in her grounds.

D **[26]** The plaintiff alleged that all these documents as stated in para. 18 constituted admissions by the defendant that the land belongs to the plaintiff and the defendant is holding the land on trust for the appellant.

**[27]** The learned trial judge in dismissing the plaintiff's claim, did not E consider these documents, as the plaintiff failed to call the makers of the same. She refused to take into consideration the account books as she was of the view that the purported maker of the account books, Mr. Yapp Hock Hoe should have been called as a witness.

**[28]** The learned trial judge also held that the defendant was not the F controlling mind of the plaintiff but instead she held that the plaintiff was controlled by one Leng Kean Kok.

**[29]** Hence, the learned trial judge held that the plaintiff failed to prove its case and she dismissed the claim of the plaintiff.

G **Findings**

**[30]** The plaintiff seeks to prove that the land had been purchased and the full consideration has been paid by the plaintiff to the defendant premised on the documents as stated in para. 18 above.

H **[31]** On the issue of whether the purchase price has been paid, the first category of documents relied on by the plaintiffs to prove its case consist of documents and/or records of the plaintiff, namely:

(i) The SPA dated 19 August 1987 which was signed by the defendant and LFC with the plaintiff (p. 218 CB2);

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(ii) A board resolution dated 19 August 1987, signed by the defendant who was then the plaintiff's director. This board of resolution authorises the sale and purchase of the land. (refer to p. 248-249 of CB);

(iii) A letter of representation dated 17 July 1996 from the plaintiff to Messrs. Tai, Yapp & Co. which was signed by the defendant, confirming that the audit accounts is correct and that the land is still registered under the director's name (refer to pp. 235-236 of CB2); and

(iv) CKHT forms which was signed by the defendant showing the plaintiff has obtained clearance from the DG of Inland Revenue Board that no chargeable gain had arisen from the disposal of the land (refer to pp. 224-232 of CB2).

**[32]** The second category of documents relied upon by the plaintiff to prove that the land has been paid are the audited accounts of the plaintiff which the plaintiff alleged contain admission by defendant that the plaintiff is the beneficial owner of the land and that the land belongs to the plaintiff.

**[33]** The third category of document are the account books of the plaintiff, namely the ledger, journal entries, cash books which show the plaintiff is the beneficial owner of the land and that the purchase consideration for the land has been fully paid.

**[34]** The first category of documents were tendered through the plaintiff's current director, PW1. However, as PW1 is not the maker of these documents, the learned trial judge did not give any weight to PW1's evidence.

**[35]** It was submitted by the defendant that RM1 had been paid by the plaintiff to the defendant as partial purchase price of the land when the SPA was entered into. The defendant further submitted that RM349,999 is the balance purchase price and to be paid to the defendant and LFC is a term under the SPA and is admitted and pleaded accordingly by the plaintiff in its statement of claim. The plaintiff claims that the purchase price has been paid, however PW1 in his evidence, is unable to say specifically in his witness statement or during cross-examination that the payment of the purchase price of RM350,000 nor the payment of the balance purchase price of RM349,000 is stated in the financial documents of the plaintiff. Apart from this, there are no other documents or proof tendered by the plaintiff during the trial that the balance purchase price of RM349,999 had been paid to the defendant and LFC. PW1 also confirmed that there are no letters or confirmation from the defendant to the plaintiff that the defendant is holding the land in trust for the plaintiff. PW1 had referred to a letter of representation dated 17 July 1996 from Malleng Enterprise to Messrs. Tai, Yapp & Co (pp. 235-236 of CB2), however PW1 is not the maker of such letter. Hence the defendant submitted that such letter is inadmissible.

**[36]** The learned trial judge accepted the submission of the defendant in this respect. However, we are of the view that the learned trial judge erred in law and in fact when she refused to accept the evidence of PW1 and PW2, for the following reasons.

**[37]** It is not in dispute that:

(i) at the material time, when the SPA was entered into between the plaintiff and defendant together with LFC, only the defendant and LFC were the directors of the plaintiff. PW1 is the current director of the plaintiff. In fact the learned trial judge has made a finding of fact in this regard;

(ii) LFC suffered a stroke and hence it is impossible to bring him to court to give evidence;

(iii) these documents are in existence and form the records of the plaintiff. These documents are in the custody and control of PW1 as the current director of the plaintiff, who took over control of the plaintiff from the defendant, before his resignation in 2013.

**[38]** Although PW1 is not the maker of such documents, however the documents are documents of the plaintiff and it was kept in the ordinary course of business of the plaintiff and that it has always been in the custody of PW1. These entries are relevant pursuant to s. 34 of the Evidence Act which provides that:

> 34. Entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to enquire, but the entries shall not alone be sufficient evidence to charge any person with liability.

There has not been any allegation of tampering of the documents or that these are not genuine documents. In other words, the existence of the documents had not been disputed by the defendant. There is also no dispute that PW1 is the new director who took over the records of the plaintiff from the defendant who was the previous director. Apart from the defendant and LFC (who is currently incapacitated due to a stroke), there is no other witness that could testify as to what happened in 1987 until 2013. It has been informed to the court during case management as well as by letter to the defendant's solicitor from the plaintiff's solicitor dated 28 August 2015 that the plaintiff has no knowledge as to who was the maker of the accounts books. Only the defendant would know who was the maker of the documents. The plaintiff has always maintained this position, which was never disputed by the defendant.

**[39]** In fact, PW1 in his evidence said that he obtained the plaintiff's financial documents from the company secretary who were given the financial documents from the defendant. However, as for the plaintiff's ledger and journal, the company secretary only has for the year 1987 and from year 1994-1999.

**[40]** PW1 also said in evidence that at all material times the defendant and LFC were the only directors of the plaintiff. The learned trial judge made a finding of fact on this, however the learned trial judge failed to appreciate that the current director would not have any knowledge who the maker was, let alone locating them. The documents are dated 15 years ago.

**[41]** Further, the defendant submitted that as for the financial documents relied by the plaintiff, it failed to show that RM1 has been paid for the land. Neither PW1 nor PW2 were able to show nor prove in the financial documents that RM1 being the deposit under the said agreement had been paid to the defendant and LFC. Hence, there is a total failure of consideration on the part of the plaintiff under the SPA.

**[42]** It is undisputed that the defendant and LFC are registered as joint equal owners of that piece of land. The defendant submitted that, if the balance purchase price had been paid, as alleged by the plaintiff, then surely the exact sum should be reflected in the financial documents of the plaintiff, which is RM174,999.50 or RM175,000 each to the defendant and LFC. This is not so, gleaning from the financial documents. Hence, the defendant submitted that the plaintiff failed to discharge proof that the purchase consideration of the land had been paid.

**[43]** However, a perusal of the audited accounts of the plaintiff show that, after the SPA was entered into in 1987, the land has been consistently recognised as the plaintiff's asset since 1987. This has been reflected in the plaintiff's audited account from the year 1987-1999 which had been signed off as correct by the defendant (pp. 301-480 of CB3).

**[44]** The evidence of these audited account was tendered through PW2 who is a chartered accountant and a partner of the audit firm that audited the accounts of the plaintiff. The learned trial judge did not consider these evidence, also on the ground that PW2 is not a maker of the audited account. The learned trial judge held that the maker is Mr. Yapp Hock Hoe. However, this is where the learned trial judge erred as the audited accounts were not prepared by Mr. Yapp Hock Hoe but the entire audit firm and Mr. Yap Hock Hoe only signed the audited accounts as representative of the firm. In addition, at the time when the trial was going on, Mr. Yapp Hock Hoe was overseas. Earlier, months before the trial, the plaintiff's counsel had asked for postponement of the trial as Mr. Yapp Hock Hoe would be overseas during the time of the trial, however it was refused by the learned trial judge.

**[45]** We are of the view that the learned trial judge has erred when she said that the plaintiff failed to satisfy the court that the situation of the plaintiff falls within the exception provided in the proviso to s. 73A(1) and the provisions of s. 73A(2) of the Evidence Act 1950 when it failed to call Mr. Yapp Hock Hoe. The learned trial judge said in her grounds that the plaintiff made no attempt to explain to the court why it is not reasonably practicable to secure Mr. Yapp's attendance, and that reasonable efforts to find him have been made without success, or that it would cause undue delay or expense in calling Mr. Yapp as a witness.

**[46]** However, Mr. Yapp's presence in court is unnecessary and his absence is not fatal to the case of the plaintiff. The learned trial judge could have exercised her discretion in accepting the evidence of PW2 and dispensed with the evidence of the maker of the documents. The audited accounts were statements made contemporaneously with the occurrence or the existence of the facts stated and that it was maintained by the company over the years as part of its records. Therefore, in view of the following:

(i) Mr. Yapp Hock Hoe, a partner of the audit firm that audited the account of the plaintiff, was not the maker of the documents and his attendance in court could not be reasonably procured. The accounts were prepared by a team of the audit firm;

(ii) PW2, who tendered the documents is a partner of the audit firm that audited the accounts;

(iii) the land has been consistently recognised as the plaintiff's asset since 1987 in the audited accounts of the plaintiff since 1987-1999 and signed off as correct by the defendant (pp. 301-480 of CB3),

the learned trial judge ought to have exercised her discretion in applying ss. 32(1)(b), 73A(1)(a)(ii) and 73A(2) of the Evidence Act 1950 in admitting the documents as evidence. In this regard the learned trial judge had erred in exercising her discretion.

**[47]** This court in the case of *Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua* [2006] 3 CLJ 27; [2006] 5 MLJ 145 at 153 held that the trial judge has a discretion to admit such evidence in that case because the document was produced from the record of a law firm who had custody and control of it. In *Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor (Third Parties)* [2001] 6 CLJ 104 at p. 112 where it was held that the documents which were made in the ordinary course of business used in commerce and trade were relevant and can be admitted under s. 32(1)(b) of the Evidence Act 1950.

**[48]** Further, the entries in the audited accounts corresponds with various other documents which are records of the plaintiff, namely, the CKHT Forms, board resolutions, the letter of representation and the accounts books

which show that the statement in the documents were made contemporaneous with other documents/records of the plaintiff and with the occurrence of facts that the land was sold to the plaintiff.

**[49]** After the SPA was entered, the land has been consistently recognised as the plaintiff's asset in the plaintiff's financial documents, without any objection from parties. This can be seen from the plaintiff's accounting and financial records until year 1999. The purchase price was treated as "amount owing to the director" in the plaintiff's financial documents. Rental income from the land has also been consistently remitted on a monthly basis to the plaintiff until 1999. The defendant and LFC by act and conduct consistently acknowledged and admitted that the land belongs to the plaintiff.

**[50]** A similar issue was raised in the Court of Appeal case of *IJM Corporation Bhd v. Zamri Hj Ibrahim & Anor* [2014] 7 CLJ 479; [2014] 2 MLJ 335 at p. 341, where the maker of the documents were not called to testify. The judge refused to admit ID2 as evidence on grounds that its signatory ("*Goh Chye Hin*") was not called as a witness and also because the appellant failed to show proof that ID2 had been posted. Goh Chye Hin could not testify as he had left the appellant. His portfolio was taken over by SP1 who, based on the appellant's records, testified that ID2 was issued and served on the respondents although he was unable to produce proof of posting. It was held that "the trial judge had misdirected himself in not admitting ID2. Evidence of the existence of ID2 and its service was testified to by SP1 who relied on the company's records to which he had custody and control". The Court of Appeal has accepted the testimony of the witness who testified based on the company's records as he was the person who took over the portfolio of the maker. Similar stand was also taken in the Court of Appeal case of *Allied Bank (M) Sdn Bhd v. Yau Jiok Hua* [2006] 3 CLJ 27; [2006] 5 MLJ 145).

**[51]** The third category of documents relied on, by the plaintiff are:

(i) the accounts books of the plaintiff:

The purchase price for the defendant's undivided share in the land has been entered into the accounts books of the plaintiff under the defendant's account (refer to pp. 284-285 of CB3). The land was debited to the plaintiff's account of land and building in the accounts books of the plaintiff.

The purchase price for the defendant's undivided share in the land has been entered as credit to the defendant's account and immediately thereto, has been placed unreservedly at his disposal. PW2 explained in her evidence on the interpretation of the accounts books. (refer to his testimony at p. 209 of CB2 at Q and A No 9)

In the case of *Garforth (Inspector of Texas) v. Newsmith Stainless Ltd* [1979] 2 All ER 73 at pp. 77 and 78, it was held that:

> ... As between those two contrasting views. I have no hesitation at all in saying that, in my judgment, when money is placed unreservedly at the disposal of directors by a company that is equivalent to payment
>
> ... it was found as a fact by the Special Commissioners that payment of the sums standing to the credit of the current accounts would have been made had the directors demanded payment from the company, so there is no question here of any fetter whatsoever at the disposal of any other person, that, I think, must be equivalent to payment.

Applying the principle as stated in the above said case, we found that the money which was credited to the defendant's account and had been placed unreservedly at his disposal, show that the purchase consideration has been considered paid.

(ii) from the cash book and the general ledger of the plaintiff (pp. 291, 297 and 298 of CB3), it shows the plaintiff has been paying the outgoings of the land including but not limited to quit rent and assessment of the land since the date of the SPA, ie, in 1987.

**[52]** PW2 in her testimony referred to the plaintiff's journal entry for year 1987. It shows that the value of the land is RM350,000 and is entered into the plaintiff's books under the section land and buildings. It is stated that the entry is for purchase of a piece of land, which is the subject land in this case, as per the agreement dated 19 August 1987.

**[53]** The learned trial judge accepted the contention of the defendant that PW2's evidence is illogical, as from the evidence of PW2, it would seem that the plaintiff has paid more than RM350,000 to the defendant for the purchase consideration although there is no legal requirement to do so (para 32(iv) of the grounds). However, the learned trial judge had failed to appreciate the evidence of PW2. That was never the evidence of PW2. PW2 said that the advances made to the defendant throughout the years by the plaintiff is more than the full purchase price of RM350,000 and hence this shows that the amount owing to the director for the purchase price has been set off throughout the years. PW2 in her evidence explained the entries in the plaintiff's accounts books with regards to the land as follows:

> It means that the Subject Land is recognised as the Plaintiff's asset or property. In fact, in accounting practice, when a property is bought by the company, the property will be entered into the accounting record as the company's fixed assets as property owned by the company and the consideration will be taken up as the company's liability to be settled by the company. It simply mean that once the asset is entered into the company's accounting record, the property is considered owned by the company.

In this case, the Plaintiff's liability in respect of the purchase of the Subject Land is the amount owing to the directors and this is the outstanding debt that the Plaintiff should settle. In the event if the Plaintiff could not settle the outstanding debt, i.e. the amount owing to the directors, the director should take action against the Plaintiff for the amount owing to them, instead of claiming that they are entitled to the Subject Land.

This is synonymous to the situation where a company borrowed money from a Bank to buy a property, and when the company failed to pay the bank loan, the bank cannot claim ownership of the property. The Bank can only take action against the company to recover the debt.

**[54]** PW2 further explained how the consideration for the subject land was settled by the plaintiff:

The consideration is considered settled when the advances made to the director is sufficient to set off the amount owing to the director. It is shown at page 75 that the amount owing to the Defendant in respect of the sale of the Subject land is RM105,000.00 and the total amount owing to the Defendant as at 31.8.1987 is RM129,240.47. Any subsequent advances made to the directors will be utilized to set off the earlier debts. From the financial documents, subsequent advances made to the Defendant by the Plaintiff is more than RM129,240.47. Page 75 shows that in September 1987, there is an advance of RM55,000.00 made to the Defendant. As the Plaintiff's books from year 1988 to 1993 are not available, we can refer to the Plaintiff's General Ledger for year 1994. *The first entry on 31 January 1994 at page 83 shows that advances to the defendant is RM187,792.59, which is more than sufficient to settle the consideration in respect of the defendant's portion of the Subject Land.* In fact the advances paid to the Defendant in 1994 is more than RM350,000.00, which is the entire sale price of the Subject Land. Therefore the consideration in respect of the Defendant's portion of the Subject Land is deemed settled.

**[55]** Further the trial judge had also held that since RM105,000 was entered into the accounts books as "amount owing to directors" and not "amount owing to director", hence PW2's evidence that amount owing to the defendant for his portion of the land had been entered into the accounts books is not logical. (para 32 (iii) of the grounds). However, the learned trial judge was plainly wrong in reading the document. A perusal of the actual accounts books show that the relevant document (p. 348 of the ROA) shows the amount has been entered as "amount owing to director" and this support the evidence of PW2.

**[56]** The plaintiff has shown that such amount has been entered into the defendant's account in the account books (p. 284 of CB3) has been set off and paid throughout the years as shown in the accounts books. PW2 in her testimony explained this in Q and A No 9. This type of payment arrangement can be done and is sufficient to succeed in the case of constructive trust. A

A case on point is the case of *Foo Holdings Sdn Bhd & Anor v. Foo Choon Ying @ Foo Chun Yin (Executor For The Estate Of Chen Choi Thai, The Deceased)* [2013] 1 LNS 908 which had been affirmed by the Federal Court. In *Foo Holdings Sdn Bhd (supra)* an SPA was executed to sell the subject land and an audited report of the plaintiff revealed that the land has been consistently
B recognised as the asset of the plaintiff. There was further evidence of minutes of the board meeting which shows admission by the defendant that the subject land belongs to the plaintiff. It was held that the purchase consideration is deemed paid when the amount credited into the director's account has been settled, as the court recognised that parties can have their own arrangement
C in respect of payment, especially when the director is the controlling mind of the company. The defendant was held to be a constructive trustee of the plaintiff and the plaintiff is entitled to recover the trust property from the defendant, notwithstanding that the transfer had not been executed and no actual payment has been made.

D **[57]** In our present case, the learned trial judge held that the defendant was not the controlling mind of the plaintiff but it was Leng Kean Kok who acted as the plaintiff's *de facto* director from 2000 to 2013. (pp. 41 and 42 of the grounds of judgment). In this respect, we found that, the learned trial judge had erred in fact and in law for the following reasons:

E (i) such fact that Leng Kean Kok acted as the *de facto* managing director of the plaintiff from 2000-2013, was not pleaded by the defendant;

(ii) there was no evidence to show that Leng Kean Kok was the *de facto* managing director or even a director of the plaintiff. The only letter where the name of Leng Kean Kok was mentioned was the letter dated
F 16 November 2001 from Tacs Associate to the plaintiff which was sent to the attention of Leng Kean Kok. The defendant did not call any witness to tender this letter nor explain why this letter was directed to the attention of Leng Kean Kok. Nevertheless, it was submitted by the defendant that Leng Kean Kok was the controlling mind of the
G defendant, which was accepted by the learned trial judge. These findings were contrary to the plaintiff's documents and testimony of the plaintiff's witness based on records of the plaintiff and the audited accounts. PW1 said in evidence that he disagreed that Leng Kean Kok took over the management of the plaintiff, which was not rebutted by
H any other witness. In addition, this finding of the learned trial judge was without any basis, documentary or otherwise;

(iii) it has been adduced as evidence that the defendant was the only director controlling the plaintiff at the material time until his resignation after 2013, as the other director LFC was in capacitated due to a stroke.
I Hence the defendant was responsible for the financial arrangement/ management in respect of the transaction of the SPA, ie, to be credited into his director's account.

*Submission Of No Case To Answer*

**[58]** The defendant did not call any witness after the plaintiff closed its case. The defendant had elected not to call any witness for their case. Hence it was a situation of a no case to answer. The learned trial judge held that such failure to call any witness by the defendant did not mean that adverse inference should be invoked against the defendant. (para 54 of the grounds of judgment).

**[59]** It is trite law that, in a situation of a no case to answer ie, when a defendant elects not to call evidence in a civil case, the learned trial judge must put to the defendant to his election that his case stands or falls on his or her submission.

**[60]** In the case of *Subry Hamid v. Husaini Tan Sri Ikhwan & Anor* [2006] 4 CLJ 50; [2006] 6 MLJ 229 and *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693, the court had held at p. 528 that:

> if the party whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

**[61]** Gopal Sri Ram FCJ, in the Federal Court case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751, at p. 759 provides a useful guide when there is no evidence put forth by a defendant in a civil case:

> In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to be presumed to be true. As Elphinstone CJ said in *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 at page 128:
>
> > if the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the Judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the Judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

**[62]** In our present appeal, the defendant did not adduce any evidence. The learned trial judge held that "it is only material for the defendant to be called as a witness to rebut the plaintiff's evidence if there is any evidence adduced that is damaging to the defendant. ... in this case, the plaintiff is unable to

prove its claim against the defendant even though it called PW1 and PW2 as its witnesses. Thus, ultimately it is not fatal to the defendant's case that he did not come as a witness or produce other witnesses ..."

**[63]** Here, the learned trial judge had erred, firstly, in not asking the question of whether the defendant has a case to answer, if the plaintiff's evidence, if believed to be true, is sufficient to prove its case. Instead the learned trial judge was of the view that the evidence adduced is not damaging to the defendant, without asking the most vital question ie, whether the defendant has a case to answer. The learned trial judge was not concerned with her belief of the PW1 or PW2's evidence. She just said in her grounds that they were not makers of the documents and the discrepancies in the figures which, to her, is illogical. However, PW1 and PW2 have given an explanation as to the entries in the journals and financial documents and their evidence are not inherently incredible or inherently improbable. In view of this, it was the duty of the learned trial judge to have accepted the evidence of PW1 and PW2 as true, in the absence of any evidence from the defendant stating otherwise. The learned trial judge had erred in failing to direct herself in this manner thereby occasioning a miscarriage of justice to the plaintiff.

**[64]** Secondly, the learned trial judge had erred in failing to draw an adverse inference against the defendant for failing to give evidence on the entries in the accounts books of the plaintiff which show advances being made to him by the plaintiff that constitutes consideration for the land. The fact whether payments have been made for the lands and whether the advances to the defendant constitutes purchase considerations paid by the plaintiff to the defendant, are relevant matters within the knowledge of the defendant. He is privy to the SPA transaction and the advances made to him and had knowledge to the matter, which are facts relevant to the dispute. This is especially so, when the defendant was the sole Director of the plaintiff until 2013, who was managing the plaintiff after the other Director, LFC suffered a stroke. The defendant was a signatory to many of the documents which have been adduced as evidence. In *Crawford v. Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, Lord Walker when delivering the judgment of the Privy Council said that:

> It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

Sarkar in his book on *Evidence* (16th edn) at p. 1678 states:

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross examination. Non appearance as a witness would be the strongest possible circumstance to discredit the truth of his case ... .

**[65]** The defendant did not give an explanation as to why he did not give evidence at the trial. In the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693 where Peh Swee Chin FCJ in his judgment said that:

> The respondents had chosen to close the case at the end of the appellant's case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having and an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.

**[66]** Therefore, the learned trial judge ought to have held that the failure of the defendant to give evidence, apart from discrediting his case, strengthened the plaintiff's case on the matter in dispute. This misdirection on the part of the learned trial judge has occasioned a miscarriage of justice which has resulted in the non judicial appreciation of the evidence of the plaintiff.

**[67]** Hence, the allegation and the evidence adduced by the plaintiff on the matter in dispute must be taken to be true. From the evidence, which has not been rebutted, it is thus overwhelming that, *prima facie* the land belongs to the plaintiff must be presumed to be true.

**[68]** There was no reason nor explanation given by the defendant as to why the defendant did not adduce evidence nor called any witness to the stand. It was only raised for the first time by the defendant in their submission in reply that the defendant is medically unfit and cannot testify. This clearly is an afterthought.

*Issue Of Laches*

**[69]** The learned trial judge held that there has been laches and inordinate delay on the part of the plaintiff in prosecuting its claim against the defendant. The plaintiff only made its demands on the defendant in 2013. Hence, due to the inordinate delay, the learned trial judge held that estoppel operates against the plaintiff (para 44 of the grounds).

**[70]** We are of the view that the learned trial judge failed to appreciate the evidence adduced which explained why the suit was only brought in 2014. It was the finding of the learned trial judge that the defendant was the only director of the plaintiff from 1999 to 2013 since LFC suffered a stroke in December 1999 and additional directors were only appointed in 2013. Therefore, the plaintiff was controlled solely by the defendant at the material time until 2013. Hence, the plaintiff could not have issued a demand on the defendant to deliver a valid and registrable transfer in favour of the plaintiff earlier than 2013. It was only after the defendant had resigned from the directorship of the plaintiff, and after the additional directors were appointed

to the Board of Directors in 2013, that the additional directors discovered that the land had not been transferred to the plaintiff. It was only at that point in time that the plaintiff could issue the demand or institute proceedings against the defendant.

**[71]** Further, for laches to be raised, there must be delay amounting to acquiescence (refer to *Cheah Kim Tong & Anor v. Taro Kaur* [1989] 2 CLJ 791; [1989] 1 CLJ (Rep) 378; [1989] 3 MLJ 252; *Foo Holdings Sdn Bhd & Anor v. Foo Choon Ying* [2013] 1 LNS 908; *Archibald v. Scully* [1861] IX HLC 360). In the present case, there is no acquiescence on the part of the plaintiff. The discovery of the land not being transferred to the plaintiff was only discovered in 2013 until the additional directors were appointed and after the resignation of the defendant.

**[72]** In any event, the defendant did not show any prejudice occasioned to him as a result of the delay of the plaintiff (if any) in prosecuting its claim against the defendant.

**[73]** Therefore, there is no delay on the part of the plaintiff in instituting the claim for the land against the defendant and neither has there been any acquiescence on the part of the plaintiff in prosecuting is claim against the defendant. As there is no delay on the part of the plaintiff, the issue of the Suit being time barred based on limitation is a non starter.

*The Claim For The Rental Income Held By The Defendant As A Constructive Trustee*

**[74]** It has been led in evidence that, prior to January 2000, the rental income from the land has been remitted to the plaintiff on a monthly basis since September 1987 and such income has been consistently entered into the plaintiff's cashbooks (refer to RA Volume 2 (3)). From the cash books, PW1 testified that the plaintiff has not received rental from the land since January 2000. This evidence has not been rebutted by the defendant.

**[75]** It was in evidence through PW1 that the provision of rental of the land has been recorded in the accounts of the tenant, ie, Empat Nombor Ekor Agency. However no rental has been remitted to the plaintiff as owner of the land. (refer to p. 59 of CB2). This has not been rebutted by the defendant.

**[76]** As it has been shown that the plaintiff is the beneficial owner of the land, the plaintiff is entitled to collect the rental out of the land. It was in evidence that the last known rental for the land was at RM12,800 per month since 2000 to date. As the full purchase consideration of the land has been paid, the defendant holds the land as constructive trustee for and on behalf of the plaintiff. Hence, whatever rental proceeds that the defendant has collected over the years from 2000 are to be held on trust for the plaintiff, out of which should be remitted back to the plaintiff.

**[77]** The defendant did not adduce any evidence to rebut the evidence adduced by the plaintiff. Hence, the evidence of the plaintiff stands unchallenged.

**[78]** We therefore allowed the appeal by the plaintiff as per the amended statement of claim for prayers (a), (b) and (e). Costs of RM15,000 to be paid to the plaintiff subject to allocator and deposit refunded.